IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

Jose Melendrez, Jr.,	)	
Plaintiff,	)	
	)	CAUSE NO:
v.	)	DR-01-CA-01-FB/DG
	)	
	)	Filed June 28, 2001
United States of America,	)	Clerk U.S. District Court
Tony Quintanilla, and	)	By Nona C.
Arnoldo Ramos,	)	Deputy Clerk
Defendants.	)	

REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Before the court is a motion to dismiss and/or for summary judgment filed by Defendant United States America (document 11), and motions to dismiss filed by Defendants Tony Quintanilla (document 7) and Arnoldo Ramos (document 3). After reviewing the defendants' motions, the plaintiff's response and the relevant law, this Magistrate Judge recommends that the motions be granted and that the case be dismissed.

Discussion

Substitution

The United States has filed a notice of substitution and supporting memorandum (document numbers 9 and 10)

asking the court to dismiss Defendants Francis E. Seib, Moses Pena, and Larry Leon from this lawsuit and substitute the United States as the sole, proper defendant as to any common law tort claims raised in this lawsuit against its employees. Title 28 U.S.C. & 2679(d)(1) provides in full:

> Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States District Court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

The authority for making such a certification has been delegated by the Attorney General to the United States Attorneys. 28 C.F.R. & 15.3(a)(2000). Through John F. Paniszczyn, Chief of the Civil Division Office of the United States Attorney of the Western District of Texas, see document number nine, the United States Attorney has certified under 28 U.S.C. & 2679(d)(1) that DEA agents Francis E. Seib, Moses Pena, and Larry Leon acted within the scope of their employment at the time of the events at issue,

thereby substituting the United States as the defendant on those claims. See Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 420 (1995).

Motion for Summary Judgment

Beginning with the motion for summary judgment file d by the United States, the Court notes that under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate when the pleadings and record evidence show that no genuine issue of material fact exists and that, as a matter of law, the movant is entitled to judgment. Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994. "[T]he substantive law will identify which facts are material." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Only disputes about material facts will preclude the granting of summary judgment. Id. In a motion for summary judgment, the burden is on the movant to prove that no genuine issue of material fact

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The United States also moved to dismiss based on the plaintiff's failure to effect proper service on the United States pursuant to Rule 4(i) of the Federal Rules of Civil Procedure. But in view of the fact that the Plaintiff's claims are clearly barred under the limitations provisions of the FTCA, the court will not address this issue.

exists. Latimer v. Smithkline & French Lab., 919 F.2d 301, 303 (5th Cir. 1990). If the non-movant bears the burden of proof at trial, the summary judgment movant need not support its motion with evidence negating the non-movant's case. Rather, the movant may satisfy its burden by showing that there is an absence of evidence to support the non-movant's case. Id. See also Little, 37 F.3d at 1075. Once the movant meets its burden, the non-movant must show that summary judgment is not appropriate. Little, 37 F.3d at 1075 (citing Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). "This burden is not satisfied with 'some metaphysical doubt as to material facts,'... by conclusory allegations,' ... by 'unsubstantiated assertions,' or by only a 'scintilla' of evidence." Id. (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The non-moving party must "come forward with 'specific facts showing that there is a genuine issue for trial.,' Matsushita, 475 U.S. at 587 (quoting Fed.R. Civ. P. 56(e)). To determine whether a genuine issue exists for trial, the court mist view all of the evidence in the light most favorable to the non-movant, and the evidence msut be sufficient such that a reasonable jury could return a verdict for the non-movant. Anderson, 477 U.S. at 477 U.S. at 248; Munoz v. Orr, 200 F.3d 291, 302 (5th Cir. 2000).

The United States moves for summary judgment on the grounds that Melendrez's tort claims are barred because they were not presented in writing to the appropriate federal agency within two years after the claim accrued. A prerequisite to the commencement of an action against the United States in federal court is the presentment of an administrative claim. Brown v. Nations Bank Corp., 188 F.3d 579, 589-90 (5th Cir. 1999). Under the Federal Tort Claims Act (FTCA), a tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal Agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. & 2401(b). A cause of action under federal law accrues within the meaning of section 2401(b)" ' when the plaintiff knows or has reason to know of the injury which is the basis of the action.'" Brown, 188 F.3d at 589-90 (quoting Moore v. McDonald , 30 F.3d 616, 620-21 (5th Cir. 1994)). In Brown, the Fifth Circuit ruled that the Plaintiff's knowledge of his injury depends upon two elements: " (1) the existence of the injury; and (2) the connection between the

injury and the defendant's actions." 188 F.3d at 590 (citing Piotrowski v. City of Houston , 51 F.3d 512, 516 (5th Cir. 1995))." Moreover, a plaintiff need not have actual knowledge" of the injury "if the circumstances would lead a reasonable person to investigate further." Piotrowski, 51 F.3d at 516 (citations omitted).

Melendrez argues that DEA personnel falsely and maliciously recommended to the federal prosecutors that the plaintiff should be prosecuted and convicted on conspiracy charges even though the DEA defendants knew that he was working as a government informant. The plaintiff further alleges that this constituted an abuse of his constitutional right to due process. Melendrez states that he was arrested in North Dakota in July 1995 based on an indictment issued from the Western District of Texas, Del Rio Division, which charged him with one count of possession with intent to distribute and one count of conspiracy. He pleaded guilty in December of 1995 to one count of conspiracy to possess with the intent to distribute a quantity of marijuana, and was sentenced on June 10, 1996 to 84 months in prison. The Plaintiff signed his claim for Damage, Injury or Death on June 20, 2000. Under the most liberal construction of events, Melendrez's claim therefore accrued on Jule 10, 1996, and he

had two years thereafter to file an administrative claim. Melendrez, however, did not file his claim until June 20, 2000, which was two years beyond the statute of limitations deadline and four years from the accrual of his cause of action.

Although principles of equitable tolling apply to the statute of limitations under the FTCA, Perez V. United States, 167 F.3d 913, 917 (5th Cir. 1999) Melendrez's circumstances do not justify their use. In Irwin v. Department of Veterans Affairs, 498 U.S. 89, 96 (1990), the Supreme Court held that equitable tolling is permissible :where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." In this case, however, there is no indication that Melendrez attempted to pursue a judicial remedy during the statutory period, nor is there any indication the United States "induced or tricked" the plaintiff into allowing the statute of limitations to pass. Accordingly, the plaintiff's tort claims against the United States are barred under the FTCA, and summary judgment should be entered in favor of the United States.

Motions to Dismiss

Turning to the motions to dismiss filed by Defendants Tony Quintanilla and Arnoldo Ramos, the court notes that Rule 12(b)(6) dismissals are granted only when it appears beyond doubt the plaintiff can prove no set of facts in support of his claim which would entitle him to relief:

In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the Plaintiff can prove not set of facts in support of his claim which would entitle him to relief.

See Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The court must accept the allegations in the complain as true and construe those allegations in a light most favorable to the party asserting them. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Cinel v. Comnick, 15 F.3d 1338, 1341 (5th Cir. 1994). At a minimum, the Federal Rules of Civil Procedure require "a short and plain statement of the claim" that "will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."Conley, 355 U.S. at 47 (quoting Fed.R.Civ.R.8(a)(2)). "However,'[d]ismissal is proper if the complaint lacks an allegation regarding a required element necessary to obtain relief.'" Blackburn v. City of Marshall , 42 F.3d 925, 931 (5th Cir. 1995).

To the extent that Melendrez is attempting to assert a 1983 claim for damages against Defendants Tony Quintanilla and Arnoldo Ramos, or a Bivens claim against Francis E. Seib, Moses Pena, and Larry Leon, see Stephenson v. Reno, 28 F.3d 26, 27-28 (5th Cir. 1994) (applying limitation of Heck v. Humphrey to Bivens-type action against federal officials), the court notes that in Heck v. Humprey, 512 U.S. 477, 486-87(1994), the United States Supreme Court held that

> in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by action whose unlawfulness would render a conviction or sentence invalid, a & 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of

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> Bivens v. Six Unknown Named agents, 403 U.S. 388 (1971). Habeas corpus, 28 U.S.C. & 2254. A claim for damages that relationship to a conviction or sentence that has not been so invalidated is not cognizable under & 1983.

(Emphasis in original). In addition to Bivens actions, Heck has been applied in a number of other situations. See, e.g., Edwards V. Balisok, 520 U.S. 641 117 S.Ct. 1584, 1588, 137 L.Ed.2d 906 (1997)(disciplinary proceedings involving the deprivations of good-time credits). Hamilton v. Lyons, 74 F.3d 99, 103 (5th Cir. 1996)(interpreting Heck to prevent accrual of & 1983 claims that would necessarily imply the invalidity of convictions on pending criminal charges); Littles v. Board of Pardons and Paroles

Division, 68 F.3d 122, 123 (5th Cir. 1995) (Parole-revocation proceeding).

> In this instance, the crux of the plaintiff's complaint is that Larry Leon, Francis Seib, Moses Pena, Tony Quintanilla, and Arnoldo Ramos violated the plaintiff's constitutional rightto due process on the grounds of abuse of process and misrepresentation when [they] investigated and recommended to the United States Prosecutor to prosecute and convict the Plaintiff on conspiracy with Guadalupe Garza, Juana Patricia Rodriguez, and others to distribute marijuana on or about March or April of 1993 through January 25, 1995 when the defendants allegedly knew that in accordance with established law Plaintiff as a Government Informant could not have conspired with Guadalupe garza, Juana Patricia Rodriguez, and others, whose individuals were the target of jointly Federal/State investigations.

The Plaintiff's complaint seeks five million dollars in monetary damages. If this court were to grant damages for the plaintiff's claims, such a ruling would necessarily implicate the validity of his criminal conviction or sentence. See Heck, 512 U.S. at 487. Accordingly, under Heck, the plaintiff must first demonstrate that his conviction or sentence has been reversed, invalidated, or expunged prior to bringing an action under 42 U.S.C. & 1983. He has not done so. Since there is no indication that an authorized tribunal or executive body has overturned or otherwise invalidated the plaintiff's conviction, and a civil rights action, if successful, would necessarily imply the invalidity of the plaintiff's conviction or sentence, his damage claims against Tony

Quintanilla, Arnoldo Ramos, Francis Seib, Moses Pena, and Larry Leon are not cognizable under section 1983 or Bivens and should be dismissed pursuant to Rule 12(b)(6).

Recommendations

(1) Pursuant to 28 U.S.C. 7 2679(d)(1), Defendants Francis Seib, Moses Pena, and Larry Leon should be dismissed from this lawsuit and all pleadings, motions, and papers filed in this action should henceforth reflect that the United States of America is substituted as the named defendant in lieu of Francis Seib, Moses Pena, and Larry Leon.

(2) After thoroughly reviewing the pleadings and record, the undersigned recommends that the motion for summary judgment filed by the United States (document 11) should be GRANTED.

(3) The motion to dismiss filed by Defendant Tony Quintanilla (document 7) should also be GRANTED.

(4) The motion to dismiss filed by Defendant Arnoldo Ramos (Document 3) should also be GRANTED.

(5) The Plaintiff may wish to file objections to these recommendations. Failure to file written objections to the findings and recommendations contained in these report within ten(10)days

from the date of its receipt shall bar an aggrieved party from receiving a de novo review by the District Court of the findings and recommendations contained herein, see 28 U.S.C. & 636(b)(1)(C), and shall bar an aggrieved party "except upon grounds of plain error from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the District Court. See Douglas v. United Services Automobile Ass'n, 79 F.3d 1415 (5th Cir. 1996). The Clerk shall mail copies of this report to the parties, return receipt requested.

SIGNED on this 27 of June, 2001.

Dennis G. Green
U.S. Magistrate Judge